IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

WRIT PETITION NO.7204 OF 2004

Framroz Hirjibhoy Soonawalla).. Petitioner

Versus

Madhusudan Dayabhai Bhatt).. Respondent

Mr.M.B.Badkar i/b.R.R.Arolkar for the Petitioner.

Respondent present in person.

CORAM: SMT.NISHITA MHATRE, J.

DATED: 10TH AUGUST 2005

P.C.:

. The Petition challenges the orders of the trial Court and the Appellate Court refusing to set aside the ex-parte decree. Both the Courts have found that the application filed by the Advocate for the Petitioner for setting aside the ex-parte decree has been filed beyond the period of limitation since there is a delay of sixty days.

2. Undisputedly, the Petitioner is 95 years old and failing in health. The Petitioner has stated that although he had received the summons, he was unable to remember where he had kept the summons due to his advancing age and illhealth. He met with an accident which took him two years to recover. All these factors

were placed on record by the Petitioner. The Petitioner also examined his Doctor. However, the Doctor who was treating him during his period of illness could not be examined as he had expired when the evidence was led. In these circumstances, in my view, the trial Court and the Appellate Court have erred in not setting aside the ex-parte order.

3. The learned Advocate for the Petitioner has relied on the judgments of the Apex Court in *N.Balakrishnan* vs. *M.Krishnamurthy*, (**1998) 7 SCC 123**, *G.P.Srivastava* vs. *R.K.Raizada and others*, **AIR 2000 SC 1221** and *M.K.Prasad* vs. *P.Arumugam*, **(2001) 6 SCC 176**. In all these cases, the Supreme Court has observed that what is important is the reason for the delay and not the period of delay. Although, the delay may be of a short duration, the reason may be uncondonable; whereas in respect of a delay for some years, if the Petitioner is able to show good and sufficient cause, delay can be condoned.

4. The Respondent, who appears in person, opposes the Petition. He has filed an affidavit placing on record his opposition. He has tried to establish through his affidavit that he is a protected tenant under Section 5(11)(c) of the Bombay Rent Act. Without going into this aspect, as it is not relevant for the purpose of deciding

whether the delay should be condoned, in my view, the Petition must be allowed. The Petitioner has been able to show sufficient cause for the delay in filing the application for setting aside the ex-parte decree. The age of Petitioner, the fact that he met with an accident and his failing health are all factors which can be considered as sufficient cause for not only condoning the delay but for setting aside the ex-parte decree.

5. Writ Petition allowed. Interim Notice No.513 of 2000 allowed on payment of costs of Rs.2,000/- (Rupees Two thousand only).

6. Both the Petitioner and the Respondent are senior citizens and it is desirable that the trial Court disposes of RAD Suit No.790 of 1994 within a period of six months after filing the Written Statement. The Written Statement shall be filed by the Petitioner within two weeks from today.

7. Parties shall appearing before the trial Court on 22nd August 2005.